

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

CHRISTOPHER HOLBDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:05-CV-1470

(NAM)

**Related Criminal Action
03-CR-0243**

APPEARANCES

OF COUNSEL:

Marris, Bartholomae Law Firm
317 Montgomery Street
Syracuse , NY 13202
Attorney for Petitioner

William R. Bartholomae, Esq.

Office of the United States Attorney
P.O. Box 7198
100 S. Clinton Street
Syracuse, NY 13261-7198
Attorney for Respondent

John M. Katko, Esq.
Assistant U.S. Attorney

Norman A. Mordue, Chief U.S. District Judge

DECISION AND ORDER¹

On November 16, 2005, petitioner Christopher Holbdy filed a *pro se* Motion to Vacate, Set Aside or Correct the sentence he received on December 17, 2004. 05-CV-1470, Dkt. No. 1 ("Motion to Vacate"). That sentence was imposed on Holbdy after he pleaded guilty before this Court on March 23, 2004 to the first count of a Superceding Indictment returned against him by a grand jury sitting in this District. *See* 03-CR-0243, Dkt. Nos. 307, 308.

In his Motion to Vacate, Holbdy asserts that he was deprived of his right to the effective

¹ The background information contained in this Decision and Order is derived from the documents filed in the present civil action, *Holbdy v. United States*, 5:05-CV-1470 ("05-CV-1470"), as well as the file of the related criminal matter, *United States v. Edwards et al.*, 5:03-CR-0243 (N.D.N.Y.) ("03-CR-0243").

assistance of appellate counsel when such counsel failed to pursue an appeal of Holbdy's sentence with the Second Circuit Court of Appeals. *See* Motion to Vacate. Petitioner specifically argues that his criminal history category was improperly enhanced by this Court at the time he was sentenced, and that appellate counsel rendered ineffective assistance by failing to pursue an appeal challenging the propriety of Holbdy's sentence. *Id.* at attached pp. 8-12.

On April 8, 2008, Assistant United States Attorney John Katko, Esq. ("AUSA Katko"), the attorney for the respondent, filed a letter-brief with the Court in which he acknowledged that Holbdy had the right to pursue an appeal in the related criminal action, and suggested that an evidentiary hearing was necessary to ascertain whether Holbdy instructed his counsel to pursue an appeal in that criminal matter. *See* 05-CV-1470, Dkt. No. 8.

On April 15, 2008, this Court scheduled an evidentiary hearing to resolve the factual matters in dispute in Holbdy's § 2255 Motion, and appointed William R. Bartholomae, Esq. to represent Holbdy at such hearing. *See* Text Order of Court (4/15/08). The day before that hearing was to commence, Attorney Bartholomae filed with the Second Circuit a Motion for Permission to File a Late Notice of Appeal. *See* 03-CR-243, Dkt. No. 823. Attorney Bartholomae noted in that submission that Holbdy claims that he requested that his counsel pursue an appeal of the sentence imposed on him by this Court following his guilty plea, but that no such appeal was perfected by counsel. *Id.* In that application, Attorney Bartholomae also notes that AUSA Katko has consented to Holbdy's request for permission to pursue a late appeal. *Id.*

Based upon the foregoing, this Court has dismissed Holbdy's § 2255 motion without prejudice to him re-filing a challenge to his sentence under § 2255 after the matter currently before the Second Circuit has been finally resolved.

WHEREFORE, for the reasons discussed herein, it is hereby

ORDERED that Holbdy's Motion to Vacate (05-CV-1470, Dkt. No. 1) is **DISMISSED**

WITHOUT PREJUDICE for the reasons stated above, and it is further

ORDERED that the Clerk of Court serve a copy of this Memorandum-Decision and Order upon the parties to this action by electronic mail.

IT IS SO ORDERED.

Date: January 9, 2009


Norman A. Mordue
Chief United States District Court Judge

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